LEGISLATIVE SERVICES AGENCY

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# Iowa Legislative Interim Calendar and Briefing

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## In This Edition




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## October 2012

| Sun | Mon | Tue | Wed | Thu | Fri | Sat |
|---|---|---|---|---|---|---|
| | 1 | 2 | 3 | 4 | 5 | 6 |
| 7 | 8 | 9 | 10 | 11 | 12 | 13 |
| 14 | 15 | 16 | 17 | 18 | 19 | 20 |
| 21 | 22 | 23 | 24 | 25 | 26 | 27 |
| 28 | 29 | 30 | 31 | | | |

## November 2012

| Sun | Mon | Tue | Wed | Thu | Fri | Sat |
|---|---|---|---|---|---|---|
| | | | | 1 | 2 | 3 |
| 4 | 5 | 6 | 7 | 8 | 9 | 10 |
| 11 | 12 | 13 | 14 | 15 | 16 | 17 |
| 18 | 19 | 20 | 21 | 22 | 23 | 24 |
| 25 | 26 | 27 | 28 | 29 | 30 | |

Thursday, October 18, 2012

**Fiscal Committee of the Legislative Council**

9:00 a.m. Reception, 10:00 a.m. Meeting, Scheman Bldg, Room 4, Iowa State University

Tuesday, November 13, 2012

**Administrative Rules Review Committee**

9:00 a.m., Room 116, Statehouse

Agenda: Published in the Iowa Administrative Bulletin:
http://www.legis.state.ia.us/aspx/BulletinSupplement/bulletinListing.aspx

**Fiscal Committee of the Legislative Council**
Co-chairperson: Senator Robert Dvorsky
Co-chairperson: Representative Scott Raecker
Location: Scheman Bldg, Room 4, Iowa State University
Date & Time: Thursday, October 18, 2012, 9:00 a.m. Reception, 10:00 a.m. Meeting
Tentative Agenda: Presentations on general matters and budgets from board members and staff of the State Board of Regents (BoR) ; on operating budgets from the presidents and staff of Iowa State University (ISU), University of Iowa (UI), and University of Northern Iowa (UNI); on capital expenditures for the UI Hospitals and Clinics; on UI flood impacts; on drought impacts from ISU extension and outreach; on the tuition set-aside program from BoR; updates on state budgets, revenue estimates, departmental budget requests, Medicaid program expenditure projections, and Executive Council performance-of-duty budgets; and tour of the Iowa State University campus.
Internet Page: https://www.legis.iowa.gov/Schedules/committee.aspx?GA=84&CID=46

**Administrative Rules Review Committee**
Chairperson: Senator Wally Horn
Vice Chairperson: Representative Dawn Pettengill
Location: Room 116, Statehouse
Date & Time: Tuesday, November 13, 2012, 9:00 a.m.
Contact Persons: Joe Royce, LSA Counsel, (515) 281-3084; Jack Ewing, LSA Counsel, (515) 281-6048.
Agenda: Published in the Iowa Administrative Bulletin:
http://www.legis.state.ia.us/aspx/BulletinSupplement/bulletinListing.aspx

### ADMINISTRATIVE RULES REVIEW COMMITTEE

October 9, 2012

**Chairperson:** Senator Wally Horn

**Vice Chairperson:** Representative Dawn Pettengill

**ADMINISTRATIVE SERVICES, *Definition of Confidential Employees*, 09/05/12 IAB, ARC 0327C, NOTICE.**

**Background.** Iowa Code §8A.412 provides in part that: "The merit system shall apply to all employees of the state and to all positions in state government now existing or hereafter established…." This general statement is followed by 24 specific exclusions; one of these exclusions is for "all confidential employees." A confidential employee is an at will employee serving at the pleasure of the appointing authority.

**Commentary.** This proposal would amend the current definition of the term "confidential employee" to include an employee who is in a confidential relationship with a state agency director, chief deputy administrative officer, a division administrator, or a similar position, and is a part of the management or legal team of that top-level administrator. Under this rule, a confidential relationship means a relationship in which one person has a duty to the other not to disclose information. Several state employees questioned this expanded definition, contending that it is vague and an improper expansion of the statutory exemption. Opponents of the rule contended that restrictions on merit system coverage should come from the Legislature.

Department representatives noted that the current definition in rule carries an objection that the committee had placed in 1986, and that in part the revision was intended to overcome this objection. The representatives were unable to identify the number of state employees that would be reclassified under this rule, noting that decisions would be made on an agency-by-agency basis. The representatives did state that the rule would not impact any collective bargaining agreement.

Several committee members questioned the need for the rule and questioned the number of state employees who would be affected. It was noted that the 1986 objection relates to the status of secretaries who served top-level administrators. In an attempt to simplify the issues surrounding this filing, the committee rescinded the 1986 objection.

**Action.** 1986 objection rescinded. Further review on adoption.

**NATURAL RESOURCE COMMISSION, *Duck Season*, 09/05/12 IAB, ARC 0307C, EMERGENCY AFTER NOTICE.**

**Background.** This filing sets the waterfowl and coot season, including a third zone for duck and goose hunting, the Missouri River zone, which includes all the lands and waters in the state of Iowa west of Interstate 29 and north of State Highway 175. The advantage of the new zone is that hunters will have the opportunity to hunt a week later in this zone than in the south zone. The establishment of a third zone also increases flexibility for adjusting duck hunting season dates if duck seasons are shortened to 30 or 45 days.

**Commentary.** The size of this new zone was significantly decreased from the initial notice. The May 2 notice included all of Iowa west of Interstate 29. As a result of comment received during the notice portion of the rulemaking process, the commission reduced the size of the new zone. Hunters complained that up until the actual June vote by the commission, adopting the final rules on an "emergency" basis, they had no notice that the actual zone would be reduced in size. They complained they had been denied a fair opportunity to oppose the reduction of the third zone. Agency representatives responded that the comment and discussion during the notice period made it clear that the actual size of the third zone was still in question. The representatives stated that size change was the result of comments and information obtained as part of the rulemaking process.

Committee members discussed this filing with regard to the judicial doctrine that even substantial changes can be made to a notice of intended action as long as those changes are within the scope of the original notice and a logical outgrowth of the comment received on the proposal. Members complained that the "emergency" adoption of the rule precluded any delay of the rule. Agency representatives explained that the agency had a narrow timeline to adopt this rule due to federal review. Some members felt that the public was denied a fair opportunity to comment on the actual size of the third hunting zone, and moved an objection to the rule. The objection failed.

**Action.** No action taken.

**PUBLIC HEALTH DEPARTMENT, *Plumbing Licenses: Renewal,* 10/03/12 IAB, ARC 0340C, ADOPTED.**

**Background.** This filing provides that a licensee who has allowed a license to lapse for not more than 365 days may renew that license without retaking the licensing examination. The filing sets both a late fee and renewal fee that will be due when such a licensee renews a license. A licensee who has allowed a license to lapse for more than 60 days cannot continue to work until the license is renewed; a licensee who does continue to work with a lapsed license may

*(Administrative Rules Review Committee continued from Page 3)*

be subject to disciplinary action. The filing identifies two options for license renewal for a licensee who has allowed a license to lapse for more than one year: (1) sitting for the appropriate examination and paying the renewal fee or (2) retaking all continuing education courses and paying the renewal fee.

**Commentary.** Several stakeholders contended that a licensee who has allowed a license to lapse for more than 60 days should be required to sit for the examination. It was noted that some existing licensees were transitioned in when state licensure was enacted and have never taken the test. These stakeholders maintain that it is a public health issue and that testing is needed to ensure these individuals are competent. Department representatives conceded this had been a contentious issue among the board members themselves.

A committee member moved a session delay on this provision to allow legislative review on license reinstatement. The motion failed.

**Action.** No action taken.

**PAROLE BOARD, *Parole and Work Release Decisions*, 09/05/12 IAB, ARC 0320C, NOTICE.**

**Background.** This rulemaking revises the Parole Board's risk assessment tool used for making releasing decisions for paroles and work releases. Currently, a risk assessment score of one through six requires three affirmative votes for a release, a score of seven or eight requires four affirmative votes, and a score of nine requires all five members to cast an affirmative vote to grant a release. The proposed amendments rescind the language tying a specific risk assessment score to the number of affirmative votes needed for a parole or work release. The amendments also change the requirement that four or five affirmative votes are needed to release certain high-risk inmates. With these changes, three affirmative votes are the most required for release of any single inmate.

**Commentary.** A representative of the Parole Board reviewed the rulemaking. He explained that the board is moving away from using a single method of risk assessment for inmates. New methods of risk assessment have been implemented and will be in place when the rulemaking becomes effective. The representative confirmed that these new risk assessments are not a part of this rulemaking, and the current risk assessment will still be used as well.

Committee members repeatedly asked if the proposed changes amount to loosening the requirements to achieve parole. The representative responded that while the number of votes needed to parole higher risk inmates will be decreased, the reason for this rulemaking is to comply with the new risk assessment methods and to reduce the lag time between parole decisions and actual time of release. He also explained that requiring more than three votes was an initial policy position when the current risk assessment was still being implemented. Now that the board has better assessment methods, requiring more than a majority vote is no longer necessary. Some committee members questioned whether removing lag time is an adequate reason to pursue this rulemaking; others felt this would improve the decision making process. Committee members asked how risk assessment scores are determined. The representative explained that it is done via computer scoring which takes account of various factors such as criminal history and taking classes while incarcerated.

A representative of the Governor's Office explained that the current risk assessment system is outdated and that the scoring methodology described in the current rule is outdated and ineffective. He also explained that only three of the five members of the board are ever present at board meetings. When an inmate requires more than three votes for a decision to be reached, a delay occurs until the other members vote, and they must work off of meeting notes rather than live experience. He also noted that there is not a specific statutory basis for requiring more than three votes for a parole decision. He stated that this rulemaking does not represent any danger to public safety and promotes efficiency in the parole and work release process.

Public comment was received from a representative of the Justice Reform Consortium. He expressed support for the rulemaking, stating that it would add more human discretion to these decisions rather than relying on scores alone. He expressed concern about the way risk assessment scores are determined, and suggested that this rule would save money and would not result in more inmates being released.

**Action.** No action taken.

**REVENUE DEPARTMENT, *Geothermal Heat Pump and Solar Energy System Tax Credits*, 10/03/12 IAB, ARC 0361C, ADOPTED.**

**Background.** Pursuant to Iowa Acts chapter 1121, (SF 2342), these amendments implement new individual income tax credits for geothermal heat pumps and solar energy systems and a new corporate income tax credit for solar energy systems.

*(Administrative Rules Review Committee continued from Page 4)*

**Commentary.** A representative of the Department of Revenue explained the rulemaking and the underlying legislation. A committee member questioned whether the date certain for the applicability of these tax credits matches the intent of the legislation. The representative replied that this is within the department's general authority and is intended to ensure the credits are not applied to actions taken years before the tax credits became effective. A motion was made to refer the rulemaking to the General Assembly for further consideration. The motion carried.

**Action.** General referral.

**Next Meeting.** The next regular committee meeting will be held in Statehouse Committee Room 116, on **Tuesday, November 13, 2012,** beginning at 9:00 a.m.

*Secretary ex officio:* Stephanie Hoff, Administrative Code Editor, (515) 281-3355.

*LSA Staff:* Joe Royce, LSA Counsel, (515) 281-3084; Jack Ewing, LSA Counsel, (515) 281-6048.

Internet Page: https://www.legis.iowa.gov/Schedules/committee.aspx?GA=84&CID=53

## LEGAL UPDATE

**Purpose.** A legal update briefing is intended to inform legislators, legislative staff, and other persons interested in legislative affairs of recent court decisions, Attorney General opinions, regulatory actions, and other occurrences of a legal nature that may be pertinent to the General Assembly's consideration of a topic. As with other written work of the nonpartisan Legislative Services Agency, although this briefing may identify issues for consideration by the General Assembly, nothing contained in it should be interpreted as advocating a particular course of action.

## LEGAL UPDATE—STATE AUTHORITY TO REGULATE ILLEGAL IMMIGRATION

Filed by the United States Supreme Court
June 25, 2012

Arizona v. United States
No. 11–182
http://www.supremecourt.gov/opinions/11pdf/11-182.pdf

### Background

In 2010, the state of Arizona enacted the Support Our Law Enforcement and Safe Neighborhoods Act ("the Act"), which contained various provisions intended to discourage the entry, presence, and economic activity in Arizona of aliens unlawfully present in the United States. Four provisions of the Act were at issue in this case.

- Section 3 established a misdemeanor for failure to comply with federal alien registration requirements.
- Section 5(C) established a misdemeanor for an unlawful alien to seek or engage in work in the state.
- Section 6 authorized warrantless arrests by state and local law enforcement officers if an officer has probable cause to believe a person has committed any public offense that would make the person removable from the United States.
- Section 2(B) required state and local law enforcement officers to make a reasonable attempt to determine the immigration status of any person they stop, detain, or arrest on some other legitimate basis if reasonable suspicion exists that the person is an unlawful alien. Section 2(B) also required that officers determine the immigration status of any person who is arrested before the person is released.

The United States filed suit against the state of Arizona, seeking a preliminary injunction to prevent the four provisions from taking effect. The United States argued that the provisions were preempted by federal immigration law. The District Court for the District of Arizona found for the government on all four of the contested provisions. The Ninth Circuit Court of Appeals affirmed.

### Issue

Whether §§ 2(B), 3, 5(C), and 6 of Arizona's Support Our Law Enforcement and Safe Neighborhoods Act are preempted by federal law.

### Arguments and Holding

The Court's 5-3 majority decision (Justice Kagan did not participate) upheld the lower court's ruling that §§ 3, 5(C), and 6 of the Act are preempted by federal law. The majority overturned the lower court's ruling regarding § 2(B), holding that there was insufficient information to support a preemption claim.

*(Legal Update—State Authority to Regulate Illegal Immigration continued from Page 5)*

**State Penalty—Federal Registration Requirements.** Section 3 established a misdemeanor for failure to comply with federal alien registration requirements. The provision essentially added a state law penalty to a federal law by regulating the same conduct. Arizona argued that this duplication was sufficient to survive a preemption challenge; there would be no conflict because the provision has the same substantive standards and the same goals as the federal law. The United States argued that federal regulation in the area of alien registration is comprehensive, meaning that the states cannot regulate in this area at all, even as a duplication of federal law. The Court ruled for the United States, finding that § 3 creates a specific conflict with the similar federal law and is thus preempted.

The Court noted that in addition to requiring registration, federal law requires that aliens carry proof of registration, be fingerprinted after 30 days, submit detailed information to the federal government including any change of address, and other matters. The Court concluded that this extensive federal regulatory scheme is comprehensive. The Court described how federal law makes the federal government alone "responsible for maintaining a comprehensive and unified system to keep track of aliens within the [n]ation's borders," and thus each state could not be allowed to establish its own policy in this area which might conflict with federal policy. The Court also noted that the penalties for violating § 3 do not match the penalties for violating the similar federal law.

**State Penalty—Unlawful Employment.** Section 5(C) established a misdemeanor for an unlawful alien to seek or engage in work in the state. This provision has no counterpart in federal law, and was not expressly preempted. However, the United States argued that the provision presents an obstacle to the comprehensive federal regulatory scheme for the unlawful employment of aliens established by the federal Immigration Reform and Control Act of 1986 (IRCA) and thus is impliedly preempted. The Court agreed with the United States.

The Court discussed how the federal system established by the IRCA differs significantly from § 5(C). The IRCA prohibits employers from knowingly hiring or employing unlawful aliens and requires employers to verify the immigration status of prospective employees; violators are subject to various criminal and civil penalties. The IRCA also imposes civil penalties on unlawful aliens who accept employment in this country. However, the IRCA does not impose a criminal penalty on unlawful aliens for seeking employment, as § 5(C) does.

The Court pointed out that Congress explicitly rejected imposing criminal penalties on unlawful aliens for seeking employment when the IRCA was passed. The Court held that by imposing such a criminal penalty, § 5(C) represents an obstacle to the balance Congress struck regarding unlawful employment of aliens when it enacted the IRCA. While Arizona had similar policy goals in mind when it enacted § 5(C), that fact was not sufficient to overcome a preemption challenge. The Court also noted that state laws such as this had been permissible before the federal statute was enacted to regulate this area.

**Warrantless Arrests.** Section 6 authorized warrantless arrests by state and local law enforcement officers if an officer has probable cause to believe a person has committed any public offense that would make the person removable from the United States. Arizona argued that § 6 was authorized by a federal statute which permits state officers to "cooperate" with the federal government in the identification, apprehension, detention, and removal of unlawful aliens. The Court rejected this argument, stating that cooperation could not be understood to include a unilateral decision by a state officer to conduct an arrest. The United States argued that such arrests would be an obstacle to the system for the removal of unlawful aliens created by Congress and thus are impliedly preempted. The Court agreed. While this provision was not expressly preempted by federal law, the Court noted that "[a]s a general rule, it is not a crime for a removable alien to remain present in the United States." Under federal law, an unlawful alien can only be arrested under certain specific circumstances. If a potentially removable alien is encountered, federal law sets out an administrative process, which may ultimately result in arrest and removal from the country. If, after a hearing, an alien is ordered to be removed from the country, then the Attorney General will issue an arrest warrant.

There are other situations in which an unlawful alien may be arrested, including if the alien is likely to escape before a warrant can be obtained. However, federal law does not permit the arrest of an alien solely because the alien is unlawfully present in the United States. The Court also noted that state officers can only arrest an unlawful alien under an even narrower set of circumstances than those applicable to federal officers. The Court ruled that allowing state officers to make warrantless arrests of aliens based on their own judgment, without adhering to federal law or even consulting with the federal government, "would allow the [state of Arizona] to achieve its own immigration policy," when "[d]ecisions of this nature touch on foreign relations and must be made with one voice." Thus, the Court determined § 6 imposes an obstacle on the federal removal process and is preempted.

**Law Enforcement—Immigration Checks.** Section 2(B) requires state and local law enforcement officers to make a reasonable attempt to determine the immigration status of any person they stop, detain, or arrest on some other legiti-

*(Legal Update—State Authority to Regulate Illegal Immigration continued from Page 6)*

mate basis if reasonable suspicion exists that the person is an unlawful alien. Section 2(B) also requires that officers determine the immigration status of any person who is arrested before the person is released. The accepted way to check a person's immigration status is to contact Immigration and Customs Enforcement (ICE), a federal agency which maintains a database of immigration records. Section 2(B) also contains three limitations: a detainee is presumed not to be an unlawful alien if the detainee provides valid identification such as an Arizona driver's license; officers may not consider race, color, or national origin except to the extent permitted by the Arizona and U.S. Constitutions; and § 2(B) must be implemented in a manner consistent with federal law regulating immigration, protecting the civil rights of all persons, and respecting the privileges and immunities of U.S. citizens. The United States argued that these immigration status verification requirements pose an obstacle to the federal immigration scheme. The Court disagreed.

The Court noted that federal law obligates ICE to respond to any request made by state officials for verification of a person's immigration status. Federal law also provides that a state or local government entity cannot be prohibited from sending to or receiving from ICE information regarding a person's immigration status. Federal law further provides that a formal agreement or special training is not necessary for mere communication with the federal government regarding a person's immigration status. Thus, the Court ruled that even though these immigration checks are mandatory and make no consideration of federal objectives in immigration policy, they are within the broad latitude for such communication provided by federal law.

Others opposing § 2(B) argued that the required immigration checks would result in prolonged detentions of some persons solely for the purpose of conducting the checks, which would be an unconstitutional seizure, as well as preempted by federal immigration law. While the Court agreed that such prolonged detentions would be unconstitutional, the Court did not agree that § 2(B) would require prolonged detentions. The Court explained that if a person is stopped or even arrested, the "reasonable attempt" requirement in § 2(B) could be interpreted to not require a prolonged detention of the person; the person's immigration status might be determined quickly or even after the person has been released. Such an interpretation would be constitutional. Additionally, it is not clear if § 2(B), when read as a whole, requires an immigration status check for every person arrested, or only when "reasonable," a word which is undefined in this context. Ultimately, the Court determined that it could not answer such constitutional issues until the Arizona courts gave a definitive answer as to how the language of this provision of Arizona law would be interpreted. Unless it is shown that § 2(B) is being interpreted in such a manner that it would be unconstitutional, the Court will presume in favor of constitutionality. The Court did caution that § 2(B) could be challenged again later depending on how it is interpreted and applied going forward.

**Concurrence and Dissent**

Three dissents were filed in this case. All three dissents concurred with the majority's ruling that § 2(B) is not preempted by federal law. Justice Alito in his dissent also concurred with the majority's ruling that § 3 is preempted.

Justice Scalia began his dissent by discussing the history of immigration laws in the United States. He described how the individual states, prior to the adoption of the federal Constitution, had the power as sovereigns to exclude from their territory people who had no right to be there. He then argued that the federal Constitution did little to diminish that power; for the first 100 years of the nation's history, the individual states commonly enacted their own immigration laws, while the power of the federal government to enact immigration laws at all was a matter of dispute. Only in 1882 was the first general federal immigration law enacted. He agreed that the United States possesses its own sovereign power to regulate immigration. He argued, however, that the federal government could not deprive the states of their own sovereign power in this area through preemption unless such preemption was unequivocally expressed in federal law. Thus, the frustration of federal immigration policy would be an insufficient reason to hold that state immigration laws are preempted. He also noted what he described as the executive branch's "refusal to enforce the [n]ation's immigration laws" and argued that the sovereign states should not be forced to accept the consequences of such a policy decision. He discussed the Act in this context.

In addressing § 3, Justice Scalia stated that it is an accepted legal principle that a state may provide that a violation of federal law is a violation of state law as well. He argued that this is especially so when a state is protecting its own interests, and in this case the state interest was protecting the integrity of its borders. While he acknowledged case law which held that states may not impose additional or auxiliary registration requirements for aliens, he argued that nowhere in federal law are states preempted from establishing additional penalties for violating existing federal registration requirements, which is all that § 3 does.

In addressing § 5(C), he rejected the majority's argument that federal law which penalizes employers for hiring unauthorized aliens while largely preempting states from imposing such penalties also implicitly preempts states from pe-

*(Legal Update—State Authority to Regulate Illegal Immigration continued from Page 7)*

nalizing unauthorized aliens for seeking employment. He argued that absent a showing of specific intent by Congress to preempt such state laws, preemption cannot be implied here.

In addressing § 6, he argued that statutory limitations on federal officials' authority to make arrests relating to immigration status did not imply any limitation on such authority for state officials. He argued that a state official arresting a person based on probable cause in conformity with federal standards for removal could not be construed to conflict with federal immigration policy, particularly given that the federal government would still ultimately decide whether the person would be removed. He also argued that a federal statute which permits state officers to "cooperate" with the federal government regarding illegal immigration does not require the states to seek prior federal approval before cooperating. Regardless of these points, he reiterated that states are entitled to have their own immigration policies.

Justice Thomas in his dissent adopted similar arguments regarding §§ 3, 5(C), and 6, as did Justice Alito for §§ 5(C) and 6.

**Impact and Applicability**

The Court held that states cannot establish criminal penalties for failure to comply with federal alien registration requirements or for an unlawful alien to seek or engage in work. The Court also held that states cannot permit warrantless arrests based on probable cause to believe a person has committed a public offense making the person removable from the United States.

The Court did hold that federal law does not preempt states from requiring law enforcement officers to make a reasonable attempt to determine the immigration status of any person they stop, detain, or arrest on some other legitimate basis if reasonable suspicion exists that the person is an unlawful alien. States are also not preempted from requiring that law enforcement officers determine the immigration status of any person who is arrested before the person is released. However, this case was limited to the issue of preemption; the Court noted that § 2(B) could still be challenged on other grounds and that a further preemption challenge could arise later depending on how it is applied by Arizona law enforcement officers and interpreted by Arizona courts. Section 2(B) became effective in September 2012.

In recent years, several states have enacted laws similar to the provisions at issue in this case. The Iowa Code does not include similar provisions, although similar provisions have been included in bills introduced but not enacted. This case identifies legal principles applicable to the enactment and enforcement of such laws.

*LSA Monitor:* Jack Ewing, Legal Services, (515) 281-6048.

## LEGAL UPDATE—FALSELY CLAIMING MILITARY MEDALS

Filed by the United States Supreme Court
June 28, 2012

United States v. Alvarez
No. 11–210
http://www.supremecourt.gov/opinions/11pdf/11-210d4e9.pdf

**Facts.** In 2007, the defendant, Xavier Alvarez, made the false claim that he had received the Congressional Medal of Honor during his first meeting as a board member of the Three Valley Water District Board. Mr. Alvarez was indicted under the Stolen Valor Act of 2005, which creates a federal offense for false claims about the receipt of military decorations or medals, and provides heightened penalties for such false claims pertaining to the Medal of Honor. Mr. Alvarez made the following false statements at the meeting, "I'm a retired marine of 25 years. I retired in the year 2001. Back in 1987, I was awarded the Congressional Medal of Honor. I got wounded many times by the same guy." (U.S. v. Alvarez, 132 S. Ct. 2537, 2542) The defendant entered a conditional guilty plea to violating the Stolen Valor Act in the United States District Court for the Central District of California, but appealed the decision under the theory that the Act violated content-based speech protections of the First Amendment to the United States Constitution.

**Procedure.** In a divided decision, the Ninth Circuit Court of Appeals reversed the conviction upon finding the Act to be invalid under the First Amendment. The Ninth Circuit declined to hear an appeal en banc, and the United States Supreme Court granted certiorari. A division of the circuits became apparent after certiorari was granted when the Tenth Circuit Court of Appeals found that the Stolen Valor Act was declared constitutional by a divided panel from that circuit in United States v. Strandlof, 667 F. 3d 1146 (2012).

**Issue.** Whether the content-based free speech protections of the First Amendment to the United States Constitution protect false claims relating to the receipt of military medals.

*(Legal Update—Falsely Claiming Military Medals continued from Page 8)*

**Holding.** The United States Supreme Court held 6-3 that the Stolen Valor Act constituted a content-based restriction on free speech in violation of the First Amendment. The Court noted that the Constitution requires that content-based restrictions on free speech be presumed to be invalid and rejected the government's contention that false statements do not merit any First Amendment protection. The Court reasoned that if the Act were to be upheld, federal and state governments could find "an endless list" of other subjects involving false statements to regulate and thereby broadly chill the freedom of speech. (*Alvarez* at 2547)

The Court noted, however, that the Act may have been saved from exacting scrutiny if the false claim provisions were conditioned upon elements of fraud or upon the speaker seeking monetary or valuable consideration in making such statements. Without such qualifications, the Court found that the government could resort to employing other methods to protect the integrity of military decorations, stating that a less restrictive method of achieving the government's objective would be by combatting the false speech with corrective speech. The Court concluded that the broad content-based restrictions of the Stolen Valor Act were not actually necessary to achieve the government's interest in protecting the integrity of military decorations. The Stolen Valor Act was therefore unable to survive the most exacting scrutiny as applied to content-based restrictions of free speech.

**Concurrence.** Two justices joined in a concurring opinion. The concurrence noted that the government had a legitimate purpose in attempting to protect the honor of military honors, but found that the Stolen Valor Act was unconstitutional based upon what it described as an intermediate scrutiny analysis. Under its analysis, the concurrence opined that false statements about easily verifiable facts are inherently less valuable than false statements regarding history, religion, philosophy, and other broad subject matters where such broad restrictions would also endanger truthful speech, but still found the Act unconstitutional on the grounds that the government could achieve its legitimate goal of protecting the value of military honors by less restrictive means. Pursuant to this rationale, the concurrence noted that the government could curtail such false claims by providing a website where such claims could either be verified or disproven or that the government could construct a new statute in which the false claim provisions were conditioned upon additional elements such as fraud in order to preclude the broad chilling effect that the Act placed upon free speech.

**Dissent.** Three justices joined in a dissenting opinion. The dissent reasoned that the plurality and concurrence break from established jurisprudence that the First Amendment "does not protect factual false statements that inflict real harm and serve no legitimate interest." (*Alvarez* at 2557) The dissent opined that the Stolen Valor Act should be upheld since the Act applied to a narrow category of false statements about verifiable facts within the speaker's personal knowledge, that the Act required proof beyond a reasonable doubt that the speaker was aware of the falsity of such statements, that the Act did not apply to either performance or hyperbole, and was viewpoint neutral. Furthermore, the dissent argued that there was an epidemic of false claims relating to the receipt of military honors and noted that military records were incomplete and could not be reliably used to counter false claims.

**Impact on Iowa Law.** Iowa Code chapter 718B makes it a simple misdemeanor for an individual to impersonate a decorated military veteran in pursuit of any real or anticipated monetary gain. This chapter would likely withstand constitutional scrutiny under a First Amendment analysis for content-based speech as the law is dependent upon elements of fraud to achieve monetary or valuable gain. A court could still, however, find that the Iowa law violates the Supremacy Clause of the United States Constitution if it were to hold that that Iowa law conflicted with federal law surrounding the regulation of military medals or if it were to find that federal law preempted the Iowa law by taking over the field of regulation of military medals.

**Note.** In response to this decision, the United States Department of Defense created a new website to provide a public record of certain medal recipients. The website, valor.defense.gov, provides information on recipients of the Congressional Medal of Honor, the Army Distinguished Service Cross, the Navy Cross, and the Air Force Cross. The website will be expanded to cover Silver Star recipients. The United States Congress has also considered, but has not yet passed, new more narrowly tailored legislation to criminalize fraudulent claims of receiving United States military honors.

*LSA Monitor:* Andrew J. Ward, Legal Services, (515) 725-2251.